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**IN THE
COURT OF APPEALS OF INDIANA**

SOUTH CENTRAL COMMUNITY MENTAL)
HEALTH CENTERS, INC., d/b/a CENTER)
FOR BEHAVIORAL HEALTH,)

Appellant-Defendant,)

vs.)

D.W. b/n/f JANICE D. WHEELER,)

Appellee-Plaintiff.)

No. 47A01-0601-CV-41

INTERLOCUTORY APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable David K. Johnson, Special Judge
Cause No. 47D01-0405-CT-551

February 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION
MAY, Judge

The South Central Community Mental Health Centers, Inc., d/b/a Center for Behavioral Health (“CBH”), appeals the denial of its motion to dismiss for lack of subject matter jurisdiction. The court had jurisdiction because the Medical Malpractice Act (“the Act”) does not require D.W.’s complaint be submitted to a medical review panel. We accordingly affirm.

FACTS AND PROCEDURAL HISTORY

D.W.’s complaint alleges the following facts. In 2003, twelve-year-old D.W. was a patient at CBH’s counseling center in Bedford. During sessions, D.W. would stay unsupervised in the waiting room while his mother, Janice Wheeler, met with his therapist, Teresa Terrell, for approximately thirty to forty-five minutes. Then, D.W. would meet with Wheeler and Terrell. On November 6, 2003, while Wheeler was meeting with Terrell, a mentally-disabled adult male patient of CBH molested D.W. in the waiting area’s bathroom. Despite requests by Wheeler to change the format of the sessions, Terrell continued to insist D.W. remain alone in the waiting room while she met with Wheeler. As a result of the molestation, D.W. has suffered medical and emotional damages.

On May 24, 2004, D.W., by his next friend Wheeler, filed a complaint alleging CBH was liable for his injuries under theories of negligence, gross negligence, and premises liability. About May 17, 2005, CBH filed a motion to dismiss D.W.’s complaint, alleging this was a medical malpractice action and trial courts do not have subject matter jurisdiction over such actions until they have been presented to a medical review panel pursuant to Ind. Code § 34-18-8-4. After a hearing, the court denied CBH’s

motion. The court later certified the denial for interlocutory appeal, and we accepted jurisdiction.

DISCUSSION AND DECISION

A court has subject-matter jurisdiction if it has the power to hear and decide a class of cases. *Madison Ctr., Inc. v. R.R.K.*, 853 N.E.2d 1286, 1288 (Ind. Ct. App. 2006), *trans. denied*. We resolve questions of subject-matter jurisdiction by determining whether the claim “falls within the general scope of authority conferred upon a court by the Indiana Constitution or by statute.” *Id.* When reviewing such a motion, we accept as true the facts alleged in the complaint. *Id.* Where, as here, the facts are not in dispute, our review of the trial court’s decision is *de novo*.

The facts and arguments herein are sufficiently similar to the *Madison Center* case that we will quote that decision at length to explain why we affirm the trial court’s denial of CBH’s motion to dismiss. R.R.K., an inpatient at the Madison Center, was being restrained by staff for disciplinary reasons when he was kicked in the face by another resident of the Madison Center, “causing significant injury.” *Id.* at 1287. He sued alleging premises liability, and the Madison Center moved to dismiss for lack of subject matter jurisdiction. The trial court denied that motion and the Madison Center appealed. We explained:

The Act defines malpractice as follows:

“Malpractice” means a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient.

IC 34-18-2-18. Thus, medical malpractice is the breach of the duty owed by a healthcare provider to its patient. The duty arises from the contractual

relationship entered into between the provider and the patient. Our Supreme Court has defined the duty as an implied contract that the provider possesses the ordinary knowledge and skill of its profession and will utilize such attributes in a reasonable, diligent, and careful manner in undertaking the care and treatment of its patient. It is a duty that flows from the special consensual relationship.

The fact that the alleged misconduct occurs in a healthcare facility does not, by itself, make the claim one for malpractice. Nor does the fact that the injured party was a patient at the facility or of the provider, create such a claim. Instead, the test is whether the claim is based on the provider's behavior or practices while "acting in his professional capacity as a provider of medical services."

Here, R.R.K.'s injuries were not caused by any services which the Center as the health care provider provided or failed to provide to him as a patient. Rather, they were caused by another resident whom the Center failed to medicate, restrain, or confine. As such, they arise not from the Center's medical treatment of R.R.K., but from his presence on the Center's premises. Indeed, a visitor upon the premises could have as easily sustained R.R.K.'s injuries.

* * * * *

Similarly, in *Midtown Community Mental Health Center v. Estate of Gahl*, we held that a claim brought by the estate of a probation officer killed by Jackson, a patient of the mental health center, was not subject to the Act's requirements when it sued the mental health center claiming that the decedent's death was the proximate result of the center's treatment of Jackson and that the center had a duty to warn. We stated that, "[t]he purpose of the Act is unrelated to the sort of liability a health care provider risks when a patient commits a criminal act against a third party." We continued:

Assuming the defendants had duty to properly medicate and supervise Jackson, we believe that a breach of that duty could constitute malpractice as to Jackson, but not as to third parties with whom Jackson might come into contact. Thus, although the Estate's claim is related to malpractice, it is not so intertwined that it falls within the purview of the Act.

So, too, here. The Center's failure to properly medicate, restrain, or confine the resident who struck and injured R.R.K. may have constituted malpractice as to that resident, but not to third parties with whom the resident may have come into contact. The duty the Center owed to R.R.K. to prevent his being subject to attack by one of the other patients was the same as the duty owed to any invitee upon the premises. It did not arise from R.R.K.'s medical treatment, but from his presence on the premises. Accordingly, R.R.K.'s claim is not subject to the provisions of the Act, and

the trial court did not err in denying the Center's motion for summary judgment.

Id. at 1288-89 (internal citations omitted).

Similarly, D.W.'s injuries could have just as easily happened to any visitor who came in contact with that mentally-disabled adult patient of CBH. While CBH's failure to restrain or confine the adult patient may have constituted malpractice as to the adult patient, it was not malpractice as to third parties. Accordingly, D.W.'s case is not subject to the Medical Malpractice Act, and the court did not err in denying CBH's motion to dismiss.¹

Affirmed.

RILEY, J., and BAILEY, J., concur.

¹ To the extent a panel of this court reached a different conclusion in *Ogle v. St. John's Hickey Mem'l Hosp.*, 473 N.E.2d 1055 (Ind. Ct. App. 1985), we decline to follow that decision for the reasons explained in *R.R.K.*, 853 N.E.2d at 1289.